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No. 05-1183

In the Supreme Court of the United States

ROLANDO ARAUJO, PETITIONER,

v.

NEDRA CHANDLER, WARDEN, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether applicability of an "actual innocence" exception to an untimely federal habeas petition warrants this Court's review, given the Seventh Circuit's factbound determination, which provided an alternative ground supporting the judgment below, that petitioner failed to make an adequate showing of "actual innocence."

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BRIEF IN OPPOSITION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established a one-year statute of limitations for filing a federal habeas corpus petition. See 28 U.S.C. § 2244(d)(1). The limitations period begins to run from the latest of four possible dates, see 28 U.S.C. § 2244(d)(1)(A-D), and is tolled during the pendency of a properly filed post-conviction petition, see 28 U.S.C. § 2244(d)(2). Because petitioner's conviction became final prior to April 24, 1996, the effective date of AEDPA, he was required to file his federal habeas petition on or before April 24, 1997. Even with the tolling effect of petitioner's state post-conviction litigation, his petition was untimely.

In the Court of Appeals, petitioner did not dispute that his petition was untimely. Instead, he maintained that he was "actually innocent," and that "actual innocence" is a freestanding exception to § 2244(d)(1) under the "fundamental miscarriage of justice" doctrine. See *Schlup v. Delo*, 513 U.S. 298 (1995). The Court of Appeals disagreed, holding that there was no freestanding "actual innocence" exception to the statute of limitations. As an independent ground supporting its judgment, the Court of Appeals also determined that, in any event, petitioner did not, and could not, demonstrate that he was "actually innocent" of the underlying offense.

Given the court's alternative holding, this case presents an exceptionally poor vehicle to resolve any conflict among the circuits regarding whether there is an "actual innocence" exception to § 2244(d). For this reason, certiorari should be denied.

STATEMENT

A. The facts underlying the crime of conviction, as set forth by the state appellate court (Pet. App. 46a-49a) are as follows.

On August 23, 1988, Regalberto Figueroa, Gabriel Mujica, Ismael Martinez, and David Chacon, all members of the Bishops street gang, met the victim, Mario Rodriguez, upon leaving Harris Park in Chicago. After conversing, Figueroa, Mujica and Martinez began walking north on the east side of the street, while Chacon and Rodriguez walked across to the west side of the street.

Petitioner, a member of the Ambrose street gang, drove past them, heading north towards 18th and Wood Streets. He stopped his maroon-colored car, jumped out, and shot at Rodriguez. As Rodriguez fell between two parked cars, petitioner ran over and fired several more shots into Rodriguez's body. Petitioner then ran back down the street, got into the same car, and drove away. At the same time, Robert Mendoza, another Ambrose gang member, stood on the east side of the street and shot his pistol in the direction of Figueroa, Mujica, and Martinez. These three individuals all identified petitioner, in court, as the gunman who shot Rodriguez.

Zaida Cintron, an Ambrose gang member and Mendoza's girlfriend at the time of the shooting, testified that at about 6:30 p.m., on August 23, 1988, she was walking at 18th and Throop Streets in Chicago, about six blocks from the scene of the murder. She noticed petitioner driving a maroon-colored car and asked him for a ride. Petitioner told Cintron that he could not oblige her because he need to hide his .38 caliber gun since he "had done something." At the time, petitioner was alone in the car. Also, when petitioner was arrested on an unrelated offense, he stated, "This ain't shit. I'm out on bond for murder from when I killed Buffy [victim Rodriguez] with the .38."

Officer Spratte testified that, on August 23, 1988, he and Detective McGreal heard a radio transmission at about 6:40 p.m. instructing them to proceed to 8059 South Oketo to apprehend petitioner, identified as a gunman in a shooting. Spratte, an expert on Chicago street gangs, and Pilsen

neighborhood gangs in particular, knew that petitioner lived at the above address. The officers arrived at the address at about 7:10 p.m. and saw a maroon Toyota Cressida in the driveway. When petitioner exited the house at about 7:30 p.m., the officers arrested him. Later that evening, Spratte obtained a search warrant for the house. A search led to the retrieval of a dark Smith and Wesson .38 caliber revolver.

The State's firearm expert examined the bullets recovered from the victim's body to determine whether they came from the revolver obtained from petitioner's residence. The expert testified that the bullets recovered from the victim's body were consistent with having been fired from that gun.

To summarize: the State's primary evidence of guilt consisted of three eyewitnesses who identified petitioner as the gunman, and the vehicle he used to leave the scene. Petitioner also gave two incriminating statements: the first immediately after the shooting, and the second upon his arrest for a separate offense. After advancing this evidence, the prosecution rested its case in chief.

For his defense, petitioner presented two primary witnesses. Officer Delgado of the Chicago police department testified that, on August 23, 1988, while off duty, he was driving west on 18th Street when he witnessed Willie Perez firing a gun from 18th and Wood Streets. He saw Perez walk down the street and fire several more shots between two parked cars. He noticed a red Toyota double parked at 18th and Wood Streets.

Terry Cornell, a private investigator for petitioner, testified that he had interviewed Mujica, who allegedly told him that he was not at the scene when the victim was shot. Similarly, Cornell said that he interviewed Figueroa, who allegedly told Cornell that he did not see who shot the victim. Mujica and Figueroa, however, denied ever making those statements to

Cornell, and confirmed that they were not given the opportunity to review Cornell's notes or sign them. Petitioner rested.

The prosecution moved to re-open the cross-examination of Delgado, and the trial court granted the motion. When Delgado took the witness stand again, he admitted that he had been a member of the Ambrose street gang 30 years previously. The jury retired to deliberate, and found defendant guilty of first-degree murder.

B. On March 31, 1994, the Illinois Appellate Court affirmed petitioner's conviction, and denied rehearing on May 9, 1994. Pet. App. 46a-52a. Petitioner did not file a petition for leave to appeal to the Illinois Supreme Court.

C. On October 21, 1996, petitioner filed a post-conviction petition under 725 ILCS 5/122-1, *et seq.* (West 1996), arguing that he was actually innocent. The trial court held an evidentiary hearing, at which Zaida Cintron and Robert Mendoza testified. Cintron recanted her trial testimony, claiming that she only implicated petitioner to protect Mendoza, her boyfriend. Mendoza testified that he, alone, was the shooter, and that petitioner was not involved.

The trial court found that both witnesses were incredible, and ultimately denied relief. Pet. App. 42a-45a. With respect to Mendoza, the trial court observed, "I don't find Mendoza's testimony today here to be credible; not so much as for what he said, but for how he said it . . . as I sit here, I can tell you that I did not believe what he said . . . I don't think that he was being a candid witness here today." *Id.* at 42a-43a.

With respect to Cintron, the trial court noted that she "has a conviction for fraud which I find to be much more relevant, highly relevant, on the question of whether or not she should be believed . . . And the proof of whether or not she is a person to be believed lies in her past, and her past indicates that she's

been convicted of fraud before. That's enough for me. What we have right now are two people who for one reason or another don't convince this Court that they should be believed here today." Pet. App. 43a.

On December 11, 1998, the Illinois Appellate Court affirmed. *Id.* at 32a-41a. In particular, the court found that the trial court "clearly found that these witnesses [Mendoza and Cintron] lacked credibility," and that there was "no reason to disturb the court's determination that defendant should not be granted a new trial on the basis of [Mendoza and Cintron's] new testimony." *Id.* at 39a. On June 2, 1999, the Illinois Supreme Court denied petitioner's petition for leave to appeal.

D. On June 6, 2000, petitioner filed a successive state petition for post-conviction relief, arguing that his due process rights were violated when the prosecution introduced false evidence (a weapon and false testimony related to that weapon), and that his trial attorney was ineffective for failing to ask for ballistics testing on the prosecution's firearms evidence. The state trial court denied relief, finding that the claims raised by petitioner were waived and barred by the doctrine of res judicata. *Id.* at 28a-31a. On September 27, 2002, the appellate court affirmed. *Id.* at 20a-27a. The Illinois Supreme Court denied petitioner's petition for leave to appeal on February 5, 2003. *Id.* at 19a.

E. On January 20, 2004, petitioner filed a federal habeas petition, arguing that the prosecution knowingly relied on false firearms evidence and that his attorney was ineffective for failing to investigate that evidence before trial. Respondent moved to dismiss the petition because petitioner filed it outside of the one-year grace period available to petitioners whose convictions became final prior to enactment of AEDPA on April 24, 1996. See *Lindh v. Murphy*, 96 F.3d 856, 865-866 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997).

Petitioner responded that the time-bar did not apply because he was "actually innocent" of the underlying offense.

F. The district court disagreed with petitioner's argument, finding that petitioner's "actual innocence" claim was logically construed as an equitable tolling argument, and was, therefore, precluded by *Gildon v. Bowen*, 384 F.3d 883 (7th Cir. 2004). Pet. App. 10a-18a. The district court also rejected petitioner's attempt to graft a freestanding "actual innocence" exception onto the text of the statute. Pet. App. at 16a-17a. Thus, the district court dismissed the habeas petition as untimely. *Araujo v. Sternes,* 2004 WL 2496467 (N.D. Ill., Nov. 4, 2004).

G. Petitioner appealed, and the Court of Appeals affirmed, holding that "actual innocence" is not a freestanding exception to AEDPA's statute of limitations, and that if petitioner's argument were reviewed within the text of the statute, the facts underlying the claim were not timely under 28 U.S.C. § 2244(d)(1)(D) because they were available to petitioner as early as 1994. *Araujo v. Chandler*, 435 F.3d 678 (7th Cir. 2005) (Pet. App. 3a-6a).

In the alternative, following a detailed review of the evidence presented by petitioner to support his theory of "actual innocence," the Court of Appeals concluded that petitioner "made an insufficient showing that he is actually innocent." *Id.* at 6a. In particular, that court deferred to the factual finding made by the post-conviction trial court that recanting witnesses Mendoza and Cintron were "incredible." *Id.* at 7a. The Court of Appeals also rejected petitioner's continued reliance on Officer Delgado, questioning how his trial testimony—that he saw another person, Willie Perez, do the shooting—could be "meaningfully improved on." *Id.* The court additionally found that petitioner's reliance on additional post-trial statements from Bishops gang members was lacking in support. *Id.* And the Court of Appeals held that there was no misplaced reliance on the ballistics evidence at trial where the prosecution witness

never matched the recovered bullet with that weapon. *Id.* The court concluded that, even if "actual innocence" were a freestanding exception to AEDPA's limitations period, petitioner's evidence was insufficient to show that "the jury would have been unlikely to convict him." *Id.*

REASONS FOR DENYING THE PETITION

The petition is not worthy of certiorari. Even if petitioner were correct to maintains that there is a conflict among the circuits regarding the viability of an "actual innocence" exception to AEDPA's statute of limitations, this case would be an exceptionally poor vehicle to resolve that conflict. The reason is that the Seventh Circuit's judgment rests on the independent and alternative ground that, even assuming there were an "actual innocence" exception, petitioner utterly failed to meet that standard. The state courts already rejected much of petitioner's proposed exculpatory evidence, and on federal habeas review, those factual and credibility determinations receive great deference under 28 U.S.C. §§ 2254(d)(2) and (e)(1). And the trial evidence of petitioner's guilt was overwhelming: three eyewitnesses identified petitioner as the gunman, and petitioner made two incriminating statements following the crime. Thus, whether "actual innocence" is a freestanding exception to the limitations period, is an equitable tolling mechanism, is confined to one of the starting points specified in 28 U.S.C. § 2244(d)(1)(A-D), or is none of the above, this Court could not reverse the judgment below unless it also granted review of the Seventh Circuit's factbound ruling that petitioner failed to satisfy the requirements of any conceivable "actual innocence" exception.

Petitioner's primary argument for certiorari is that there is a circuit split with respect to the availability of an "actual innocence" gateway to excuse an otherwise untimely habeas petition. Pet. 16-24.

The present case does not present the proper vehicle for resolving the alleged circuit split because petitioner cannot, under any circumstances, show that he is "actually innocent." That is, the choice of standards would have no effect on the ultimate outcome of petitioner's "actual innocence" claim. See Robert L. Stern, et al., *Supreme Court Practice*, § 4.4 at 231 (8th ed. 2002) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied."); *id.* § 6.37(a), at 457 (case presents a poor vehicle for reaching the question presented where "the facts are so one-sided that the case would be decided in favor of the respondent no matter how the conflict is resolved").

Here, the ultimate outcome of petitioner's "actual innocence" argument would be the same, no matter what standard this Court were to endorse. The Seventh Circuit's determination that petitioner was not "actually innocent" of the underlying offense aptly proves this point. Significantly, in rejecting the petitioner's arguments for "actual innocence," the Court of Appeals declined to reassess the factual and credibility findings made by the state courts. This was a proper exercise of restraint. It is beyond dispute that a federal court adjudicating a habeas petition must presume that findings of fact made in state court are correct, see 28 U.S.C. § 2254(e)(1), and must refrain from re-weighing the credibility of state court witnesses. See *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (federal courts cannot re-determine credibility of witnesses whose demeanor has been observed by the state court). And, in the present case, that same evidence, would fare no better before this Court than it did before the Seventh Circuit.

The Seventh Circuit's discussion of petitioner's evidence of "actual innocence" is divided into four parts. Petitioner first argued that the recantations offered by Robert Mendoza and Zaida Cintron undermined the prosecution's case. Mendoza

testified at the post-conviction evidentiary hearing that petitioner did not shoot at the victim, but only transported Mendoza and Herbie Zuniga to the scene of the shooting. According to Mendoza, petitioner was unaware of the motive for the shooting and, other than providing transportation, was uninvolved in the entire affair. Likewise, Cintron recanted her original trial testimony assigning guilt to petitioner, explaining that she implicated him in the shooting only to protect herself and Mendoza from criminal charges. Pet. App. 34a-37a.

The post-conviction trial judge viewed the testimony of these witnesses in a hearing and thoroughly disbelieved them: Mendoza's demeanor suggested that he was lying, and Cintron's criminal history included a conviction of fraud. The court thereafter denied post-conviction relief, *id.* at 42a-45a, and that decision was affirmed on appeal, *id.* at 32a-41a.

These credibility assessments, as findings of fact, are presumed to be correct absent clear and convincing evidence from petitioner. See § 2254(e)(1). On habeas review, petitioner presented no evidence to rebut the credibility findings made by the state post-conviction trial judge. Under the governing standard, the Court of Appeals was bound by these factual findings, and exercised the proper restraint in declining to disturb them. Pet. App. 7a.

Petitioner further argued that the three Bishops gang members who identified him at trial—Regalberto Figueroa, Gabriel Mujica, Ismael Martinez, and David Chacon—actually lied about their identifications. In support of this contention, petitioner only offered several affidavits that consisted of hearsay; accordingly, the Court of Appeals accurately noted that this particular argument "lacked support." *Id.* This conclusion was sound, as hearsay evidence is "particularly suspect" when viewed within the context of an actual innocence argument. *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

Petitioner aiso emphasized that, following additional post-trial ballistics testing, the .38 pistol found in petitioner's home and introduced into evidence at trial did not match the bullet recovered from the victim. According to petitioner, this discrepancy proved that he was innocent. The Seventh Circuit disagreed with petitioner's assessment of this proof, observing that, at trial, the prosecution's ballistics expert did *not* positively match the gun with the recovered bullet. Pet. App. at 7a. In fact, the expert testified that the majority of weapons in the United States exhibited the same characteristics as the weapon introduced at trial. *Id.* Here, again, the Seventh Circuit's resolution properly deferred to the factual finding, made by the state courts, that petitioner overestimated and misconstrued the potency of the new ballistics evidence. *Id.* at 7a, 40a.

Lastly, petitioner maintained that Officer Delgado's post-trial testimony—that Delgado did not see petitioner at the shooting—sufficed as evidence of "actual innocence," and that a post-trial hearsay affidavit enhanced his account. Once again, the Court of Appeals properly deferred to the findings of fact made in the course of petitioner's trial and collateral litigation, doubting how Delgado's exculpatory testimony, the credibility of which was already evaluated and rejected by petitioner's jury, could "meaningfully be improved on." *Id.* at 7a.

In sum, the evidence of petitioner's guilt is so overwhelming, and his proposed exculpatory evidence so feeble, that the Seventh Circuit's resolution of the case would stand no matter what standard this Court were to endorse. Under these circumstances, certiorari should be denied.

Finally, petitioner attempts to manufacture a circuit split regarding the Seventh Circuit's application of *Schlup*, arguing that certiorari is necessary to "provide further guidance to the lower courts in the context of applying the fundamental miscarriage of justice exception to section 2244(d)." Pet. 25-

26. In particular, petitioner argues that the Court of Appeals misapplied *Schlup* to the facts of his case, and that it improperly narrowed the *Schlup* standard to require a showing of "irrefutable evidence" of innocence. Pet. 25-26.

Neither argument warrants this Court's review. Petitioner's disagreement with the Court of Appeals' application of *Schlup* to his case, see Pet. 25-26, is an insufficient basis upon which to grant certiorari, as that argument only takes issue with the application of a legal rule to a particular set of facts. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule"). See also Stern, *supra*, § 4.17 at 255 ("The Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles.").

Nor did the Court of Appeals apply a standard more restrictive than *Schlup*. Under *Schlup*, a petitioner must produce "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. With that evidence, the petitioner must show that no juror would have convicted him in light of the new evidence. *Id.* at 327. Petitioner claims that the Court of Appeals imposed a stricter standard, and cites to language that variously describes petitioner's inability to provide "irrefutable," "clear-cut," or "conclusive" evidence showing that he is innocent. Pet. 26.

Such language merely characterized the view of petitioner's evidence; it did not jettison the applicable standard. Indeed, the Seventh applied the correct standard, holding that "[t]he evidence Araujo offers falls short of showing that . . . the jury would have been unlikely to convict him." Pet. App. 7a. This is the same standard articulated by the Sixth Circuit in *Souter*

v. Jones, 395 F.3d 577 (6th Cir. 2005), which found that the petitioner *did* meet his burden under *Schlup*. See *Souter*, 395 F.3d at 602 ("when an other wise time-barred habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found [petitioner] guilty beyond a reasonable doubt, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims"). And it is, naturally, the same standard articulated in *Schlup*.

Thus, the Court of Appeals' articulation—and application—of *Schlup* did not constitute a radical departure from settled law, and therefore does not fall within the class of cases that, as noted by the petitioner in *House v. Bell*, No. 04-8990, cert. granted June 28, 2005, have interpreted *Schlup* "in radically different ways." Pet. 26. Under these circumstances, certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

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